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CRAFTING TRUE IMMIGRATION REFORM

Richard A. Boswell[†]

I. INTRODUCTION.....	7
II. THE ELUSIVITY OF REFORM.....	8
A. <i>National Security and Terrorism</i>	13
III. AMERICA’S CHANGING DEMOGRAPHICS.....	19
IV. A GROWING UNDOCUMENTED POPULATION.....	22
V. PROPOSED REFORMS	31
A. <i>Reducing the Underground Population</i>	32
B. <i>Dealing with the Forces of Migration</i>	34
VI. CONCLUSION	36

I. INTRODUCTION

It seems that nearly every twenty years the topic of immigration reform receives national attention; yet perplexingly, legislative outcomes have fallen far short of their stated goal of creating serious reform. Comprehensive or national reform commissions have been established periodically to study the immigration problem and to craft long-range solutions. While these efforts at moving us toward broad reform have yielded some positive results, the country nonetheless remains confronted with serious structural problems on the immigration front. In the 1960s, reform efforts resulted in the reduction of national origin discrimination on the admission of immigrants.¹ In the 1980s, the reforms established a uniform procedure for asylum admissions and a broad-based

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1. See Immigration and Nationality Act of 1965, Pub. L. No. 89-236 § 202, 79 Stat. 911, 911 (1965) (“No person shall receive any preference or priority or be discriminated against in the issuance of an immigration visa because of his race, sex, nationality, place of birth, or place of residence.”).

amnesty program.² In 2006, proposals were introduced that would have restructured the immigrant preference system as well as granted legal status to a large undocumented population.³ I would argue that notwithstanding some of the positive aspects of the changes enacted in the reforms of the 1960s and 1980s, comprehensive reform has been for the most part elusive. Further, unless the reform efforts deal with the deep structural problems in our immigration system, any laws enacted will be ineffective. Unfortunately we live in a time when immigration reform is sorely needed, yet the economic downturn in which we find ourselves makes reform less likely.

Why has true reform been so elusive? Is a comprehensive structural reform really possible? Will we be forever plagued by piecemeal efforts to craft immigration laws that are in need of substantial amendment soon after enactment? What are the areas of our immigration laws that are in need of restructuring? In this essay, I argue that reform has not occurred, first because there has been insufficient pressure brought to bear on decision-makers for making the necessary serious changes, and second because, as a nation, we have grown accustomed to living with a substantial undocumented population. Finally, I posit that two emerging elements, global economic interdependence and national security, may provide sufficient impetus for reform of a more lasting nature.

II. THE ELUSIVITY OF REFORM

The foundations of contemporary U.S. immigration laws were enacted following World War II, as the United States emerged as a global power. The laws are found in what is commonly referred to as the McCarran-Walter Act of 1952.⁴ Named for its authors,

2. See Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102; Immigration and Nationality Act Amendments of 1986, Pub. L. No. 99-653, 100 Stat. 3655. See also Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359.

3. In 2006, the Senate version of immigration reform was contained in S. 2611, 109th Cong. (2006), and the House version was H.R. 4437, 109th Cong. (2006). While both chambers of Congress enacted the bills, the proposals were never reconciled in a form that could be signed by the President. A reform bill was introduced in the Senate in 2007 in the form of the Comprehensive Immigration Reform Act of 2007, S. 1639, 110th Cong., but the Senate never passed it.

4. Pub. L. No. 82-414, 66 Stat. 163 (1952).

Patrick McCarran, a Democrat from Nevada, and Francis Walter, a Democrat from Pennsylvania, the legislation removed the blatantly racial restrictions of previous immigration law yet retained the quota system that controlled the flow of new immigrants which had been enacted in 1921 following the great migration of the early 1900s.⁵ The McCarran-Walter Act was enacted at the height of the nation's concern about the threat of communism and therefore contained numerous ideologically restrictive provisions.⁶ As the renowned immigration lawyer and commentator, Jack Wasserman, explained, the McCarran-Walter Act contained nearly 700 separate bases for deporting immigrants.⁷ This controversial legislation⁸ was severely criticized by the American Bar Association, and enacted over President Truman's veto.⁹ While the legislation could be praised for its codification of the existing consensus on an immigration system, there were many subjects left untouched, including the national origins quota system, proposals for the establishment of an Article III court for adjudicating immigration cases, and the judicial review of consular officer decisions.¹⁰

Further reform efforts began in the 1970s and resulted in the establishment of a Presidential Commission commonly known as the Hesburgh Commission.¹¹ The Commission was confronted with the reality of a growing population of undocumented persons with

5. Act of May 19, 1921 Pub. L. No. 42-5, ch. 8, 42 Stat. 5 (1921) (limiting the immigration of aliens into the United States).

6. See McCarran-Walter Act, Pub. L. No. 82-414, § 212(a)(28)(c), 66 Stat. at 184-85 (1952) (stating that those who are affiliated with communist organizations are ineligible to receive visas).

7. JACK WASSERMAN, IMMIGRATION LAW AND PRACTICE 215 (3d ed. 1979).

8. RICHARD A. BOSWELL, ESSENTIALS OF IMMIGRATION LAW 62 (2006).

9. See Veto of Bill to Revise the Laws Relating to Immigration, Naturalization, and Nationality, PUB. PAPERS 441, 447 (June 25, 1952) (criticizing the legislation for its discriminating effects).

10. WHOM WE SHALL WELCOME: REPORT OF THE PRESIDENT'S COMMISSION ON IMMIGRATION AND NATURALIZATION 61, 145-52 (1953). See also 7 ADMIN. L. BULL. 235-39 (1954-55) (reviewing the recommendations of the Committee on Immigration and Naturalization); REPORT OF THE NATIONAL COMMITTEE ON LEGISLATIVE MATTERS, 10 ADMIN. L. BULL. 17-18 (1957-58) (reviewing immigration and nationality legislation); Harry N. Rosenfield, *Consular Non-Reviewability: A Case Study in Administrative Absolutism*, 41 A.B.A. J. 1109 (1955) (detailing the American Bar Association's opposition to the legislation and its alternative proposals). The issues that were dealt with remain persistent problems to this day.

11. See Act of Oct. 5, 1978, Pub. L. 95-412 § 4, 92 Stat. 907, 907-08 (Oct. 5, 1978), as amended by Pub. L. 96-132, § 23, 93 Stat. 1051 (Nov. 30, 1979).

few prospects of obtaining legal status.¹² It was only in 1986 that some of the reforms proposed by the Hesburgh Commission were finally enacted in what became known as the Simpson-Mazzoli-Rodino legislation.¹³ The 1986 legislation provided broad amnesty for many of the undocumented population,¹⁴ and also imposed penalties on employers who knowingly hired undocumented workers.¹⁵ While the legislation purported to deal with illegal immigration, the problems were not abated because many people were unable to qualify, thereby remaining underground, and those who had been legalized began petitioning for family members, further burdening the immigrant quota system.¹⁶

One of the problems with the 1986 reforms was that they did not address a fundamental tension in U.S. immigration law, which was that there exists a vast gap between the demand for immigrants and the immigrant quotas that restrict the number who can legally be admitted. This has resulted in an ever-growing population of undocumented persons. Stated another way, from the perspective of those opposed to greater migration, the fundamental problem with the 1986 reforms was that it encouraged illegal migration by rewarding the law breakers with legal status.¹⁷ The 1986 legislation avoided dealing with the fact that the migration of the 1970s and

12. See Vernon M. Briggs, Jr., *L.A. Story: Immigrant Workers and the Future of the U.S. Labor Movement*, 60 INDUS. & LAB. REL. REV. 430, 431 (2007) (book review).

13. See Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359.

14. *Id.* § 201, 100 Stat. at 3394 (granting amnesty to those illegal aliens who entered the United States before 1982 and had remained there continuously).

15. *Id.* § 101, 100 Stat. at 3360.

16. ETHAN TIMM, *WHAT YOU NEED TO KNOW ABOUT GUESTWORKERS, FROM THE GROUND UP* (1997). The immigrant quota system allows approximately 700,000 persons to be admitted as either employment- or family-based immigrants. Immigrant workers are sponsored by their employers and family-based immigrants are sponsored by their spouses, parents, adult children, or siblings. 8 U.S.C. § 1153(a) (2006). The amnesty provisions under the 1986 amendments required that each individual applicant be qualified for the legalization program—this meant that a non-qualifying family would have to find alternative routes to gaining legal status. 8 U.S.C. § 1255a(a) (2006). Under the regular immigrant visa system, family members are eligible for derivative status as the primary applicant. 8 U.S.C. § 1153(d) (2006). Once a person had his or her status converted to that of a lawful permanent resident, he or she could then petition for his or her family member, creating a larger pool of potential people to become sponsors.

17. Cf. Kris Kobach, *Administrative Law: Immigration, Amnesty, and the Rule of Law*, 36 HOFSTRA L. REV. 1323, 1329 (2008) (criticizing granting amnesty for illegal aliens generally).

early 1980s would place tremendous pressures on the immigrant quota system which would create a situation of extensive waiting periods for those seeking legal status, thus providing additional reasons for immigrants to enter illegally.¹⁸

Serious public discussion of reform reemerged in early 2001 with the election of President George W. Bush, a former governor of Texas, who was seen as being receptive to the issue and as having good relations with then-President of Mexico, Vicente Fox Quesada.¹⁹ The prospects for reform were extinguished by the attacks of September 11, when the nation's attention was shifted to anti-terrorism efforts and wars in Afghanistan and Iraq.²⁰ After President Bush's reelection, however, momentum began to build again for comprehensive immigration reform and serious proposals were introduced in each House of Congress.²¹ After rancorous debate, the legislation never managed to reach the President's desk.²² Various groups advocated for a range of irreconcilable reforms. Immigrant rights groups were concerned about the erosion of due process protection afforded immigrants facing removal and sought a broad amnesty program and reform of the system for legal migration.²³ Businesses hoped for reforms that would enable them to hire the workers they needed without being encumbered by extensive processing delays.²⁴ Those concerned

18. Historically, the United States immigrant visa system has granted entry to persons who have family ties with U.S. citizens or permanent residents or who have skills that are sought by a U.S. employer. The post-World War II superpower status of the United States made the country increasingly attractive to people on the move. Migrants began to come to this country in ever larger numbers from countries where the United States had a military presence, and those numbers increased as a result of political conflicts. As those migrants obtained legal status, they began to petition for their family members, creating a situation where those wishing to immigrate based on a family relation to a U.S. citizen can wait for many years due to high demand.

19. See *Bush Administration Considers "Regularization" Proposals in Advance of September Meeting with Mexican President*, 30 INTERPRETER RELEASES 1269, 1269 (2001).

20. Elisabeth Bumiller, *Bush Would Give Illegal Workers Broad New Rights*, N.Y. TIMES, Jan. 7, 2004, at A1.

21. See *supra* note 3 and accompanying text.

22. Randal C. Archibold, *Bill Dies, Views Divide and Immigrants Work On*, N.Y. TIMES, June 30, 2007 at A1.

23. See generally National Immigration Forum, <http://www.immigrationforum.org/DesktopDefault.aspx?tabid=148> (last visited Dec. 13, 2008) (providing a window into some of the above arguments).

24. See *Noteworthy*, 84 INTERPRETER RELEASES 1467, 1467 (2007); *Fruit Farmers*

about illegal immigration complained that insufficient effort was being placed on border controls and that an amnesty or “pathway to citizenship” would only reward those who violated the law.²⁵ One final proposal, before the legislative process concluded at an impasse, was a proposal to replace the current family- and employment-based immigrant visa systems with one that awarded points depending on a person’s family ties in the United States, education, skills, and language ability.²⁶ While not resulting in positive legislation, the debate was perhaps the most far-reaching in recent history. In the end, Congress authorized increased border enforcement and the Administration has begun the construction of a wall at locations along the U.S.–Mexico border.²⁷ Since the failure of comprehensive immigration reform, Immigration and Customs Enforcement (ICE) has stepped up its enforcement measures within the United States, resulting in highly publicized raids on businesses and areas with higher concentrations of immigrants.²⁸

At present, I would identify three major factors as providing an opportunity for comprehensive reform. The first relates to national security and the importance of protecting the country from terrorism. The second is the greater economic interdependence or globalization of economic markets. A third would be the sizeable population of foreign-born persons or recent immigrants, beginning with those who immigrated in the 1980s and 1990s, who became citizens and began voting in ever increasing numbers.

Worry: Will Workers Show?; Immigration Laws in Flux: Labor Shortage Possible, GRAND RAPIDS PRESS, Apr. 14, 2007, at B1.

25. Bob Kemper, *Isakson Offers Border Proposal: Immigration Reform Gets Another Look*, ATLANTA J. & CONST., Jan. 19, 2007, at C1. The notion that legal reform was a “pathway to citizenship” was misleading because a legalized person only obtains status, which is preliminary to obtaining lawful permanent residence, not citizenship.

26. See Comprehensive Immigration Reform Act, S. 1348 & S. 1639, 110th Cong. (2007); Immigrant Accountability Act, S. 1225, 110th Cong. (2007). The proposal was modeled after some aspects of the Canadian immigration “point” system.

27. *DHS Secretary Chertoff and Attorney General Mukasey Address Immigration Enforcement and Border Security*, 85 No. 10 INTERPRETER RELEASES 688, 688–90 (Mar. 3, 2008).

28. Jacob Wedemeyer, *Of Policies, Procedures, and Packing Sheds: Agricultural Incidents of Employer Abuse of the H-2B Nonagricultural Guestworker Visa*, 10 J. GENDER RACE & JUST. 143, 156 (2006).

A. *National Security and Terrorism*

It has been said that the country was forever changed by the events of September 11.²⁹ While the terrorist attacks were not the first on American soil, and had been preceded by an attack on the World Trade Center in 1993, shootings at the CIA in that same year,³⁰ and even a car bombing in Washington, D.C. of a Chilean dissident in 1975,³¹ these events did change the prism through which Americans viewed the world.³² Americans began focusing more attention on the growing population of undocumented immigrants, both from illegal border crossings and those who entered with visas and remained.

While the security concerns are serious and genuine, many of the measures taken by the government following the terrorist attacks have been or have provided very limited benefits in the way of actually protecting Americans.³³ Many believe that we have made some serious mistakes, which hopefully will be corrected in the near future. It is not necessary to belabor this discussion with the intricacies of the U.S. Patriot Act, but it is worthwhile to note the Act's general thrust, which was primarily to take down the wall dividing domestic and international intelligence. That is, the act aimed to remove some of the barriers between the intelligence and domestic law enforcement agencies such as the CIA and FBI and other agencies.³⁴ Another purpose of the Act was to give more power to the multiple agencies involved in controlling foreigners coming to the United States, and to improve how these persons were being monitored after their arrival.³⁵ While some have had concerns with the degree to which civil liberties have been eroded as a result of this expansion of power in the intelligence agencies, that is not the focus of this paper. The focus instead is on the impact of the expansion of powers in the agencies involved in

29. See, e.g., Lori Sachs, *September 11, 2001: The Constitution During Crisis: A New Perspective*, 29 FORDHAM URB. L.J. 1715, 1749 (2002).

30. See *Five Men Shot Near CIA Gate; 2 Killed*, ST. PETERSBURG TIMES, Jan. 26, 1993, at 1A.

31. See TAYLOR BRANCH & EUGENE PROPPER, *LABYRINTH* (Viking 1982).

32. Jeffrey Toobin, *CRACKDOWN: Should We Be Worried About the New Antiterrorism Legislation?*, NEW YORKER, Nov. 5, 2001, at 56, 57.

33. DAVID COLE & JULES LOBEL, *LESS SAFE, LESS FREE: WHY AMERICA IS LOSING THE WAR ON TERROR* 95–170 (New Press 2007).

34. See Toobin, *supra* note 32, at 58.

35. *Id.*

immigration control, primarily with the Departments of State, Justice, and Homeland Security.³⁶ The critique here is that on one hand the broad expansion of statutory authority was not needed, and on the other, that a one-sided enforcement-oriented approach only exacerbates the immigration problem.

United States consular officers have, for a whole host of reasons, always had the unreviewable power to deny visa applications to persons coming to visit the country on a temporary basis.³⁷ This power even extends to consular officers who are reviewing the applications of those who intend to immigrate.³⁸ Nothing in the version of the Immigration and Nationality Act which existed before the amendments made by the Patriot Act prevented a consular officer from denying a visa to someone who might be suspected of ties to terrorism.³⁹ Indeed, beginning in the late 1980s, Congress began enacting laws that significantly expanded the agency's mandate to remove and exclude undesirable non-citizens.⁴⁰ In 1996, the Anti-Terrorism and Effective Death Penalty Act (AEDPA) gave the immigration agency unprecedented powers to remove suspected terrorists.⁴¹

36. Established in 2002, the Department of Homeland Security assumed many of the responsibilities of the former Immigration and Naturalization Service. See Homeland Security Act of 2002, Pub. L. No. 107-296, § 101, 116 Stat. 2135. For an excellent description of the complicated division of responsibilities, see David A. Martin, *Immigration Policy and the Homeland Security Act Reorganization: An Early Agenda for Practical Improvements*, 80 No. 17 INTERPRETER RELEASES 601 (Apr. 28, 2003).

37. While decisions of U.S. consular officers regarding visa requests are not subject to judicial review, one may request an advisory, "non-binding" opinion from the State Department's visa office. See 22 C.F.R. §§ 41.121(d), 42.81(d) (2008). As noted earlier, the non-reviewability of consular decisions arose as an issue when the McCarran-Walter Act was passed in 1952. See *supra* note 10 and accompanying text.

38. See Russell Wolff, *The Nonreviewability of Consular Visa Decisions: An Unjustified Aberration from American Justice*, 5 N.Y.L. SCH. J. INT'L & COMP. L. 341, 365 (1984); James A.R. Nafziger, *Review of Visa Denials by Consular Officers*, 66 WASH. L. REV. 1, 26 (1991).

39. For example, immigration laws have always included provisions for screening possible non-immigrants and immigrants for terrorist or other activity that might be prejudicial to the national interest. 8 U.S.C. § 1182(a)(3) (2006).

40. This began with the Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181.

41. See Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214. The legislation also created a special terrorist removal court. See 8 U.S.C. §§ 1532-35 (2006).

The Department of State and legacy INS⁴² (which preceded the establishment of the Department of Homeland Security) failed to identify the first bombers of the World Trade Center in 1993.⁴³ The admission of the 2001 perpetrators was not a result of a lack of power but was due to a combination of bad investigative work, including deficient scrutiny at the consular level overseas and immigration officers at ports of entry. One practice, which has since been abandoned, allowed some of the 9/11 hijackers to receive visas without ever having to present themselves for an interview (this was abandoned in August of 2003).⁴⁴ Consequently, a number of the terrorists traveled in and out of the United States several times.⁴⁵ Some of those involved in the first World Trade Center bombing were on the “Watch List” of persons who should not have been issued a visa nor have been allowed to enter the United States.⁴⁶ The fact that these people were able to get into the United States was a failure in the admissions process and not the legal powers available to the immigration and consular officials.

Some of the more publicized efforts taken by immigration authorities after 9/11 to deal with potential terrorist threats were counterproductive. These efforts, or at least the ones that we have information about, fall into the category of what can be called enhanced identification measures, reporting-in-requirements, or might be better characterized as document perusal and interviews.⁴⁷ These efforts, under the Special Registration program,

42. Until 2002, the agency responsible for enforcing most immigration laws was known as the Immigration and Naturalization Service (INS); in 2002, its functions were moved to various parts of the Department of Homeland Security. See Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135.

43. THE 9/11 INVESTIGATIONS: STAFF REPORTS OF THE 9/11 COMMISSION 13 (Steven Strasser ed., Public Affairs Reports 2004).

44. See Enhanced Border Security and Visa Entry Reform Act of 2002, Pub. L. No. 107-73, § 306, 116 Stat. 543, 555; Documentation of Nonimmigrants Under the Immigration and Nationality Act, as Amended; Personal Appearance, 68 Fed. Reg. 40,127 (2003) (amending 22 C.F.R. § 41.102).

45. See THE 9/11 INVESTIGATIONS, *supra* note 43, at 10–14.

46. See JAMES J. CARAFANO & HA NGUYEN, THE HERITAGE FOUNDATION, BETTER INTELLIGENCE SHARING FOR VISA ISSUANCE AND MONITORING (2003), <http://www.heritage.org/Research/HomelandSecurity/BG1699.cfm> (citing U.S. General Accounting Office, *Border Security: Visa Process Should be Strengthened as an Antiterrorism Tool*, GAO-03-132NI, Oct. 2002, at 6).

47. See Registration of Certain Nonimmigrant Aliens From Designated Countries, 67 Fed. Reg. 67,766 (Nov. 6, 2002). The program was instituted by the issuance of regulations that required nationals of the following countries to appear: Iran, Iraq, Libya, Sudan and Syria. *Id.* For a full regulatory history of the

required that persons of certain nationalities report in and answer questions related to their activities in the United States and possible terrorist connections.⁴⁸

The Special Registration program was strongly criticized from a number of non-partisan quarters. The Government Accountability Office (GAO) of the U.S. Congress concluded that much of the more than one-year effort at perusing documents and questioning people of certain nationalities produced few benefits.⁴⁹ Similar critiques were made by the Department of Justice's Office of the Inspector General.⁵⁰ Many of the conclusions reached by the GAO and Inspector General echo the critiques made by immigrants rights advocates which were made when the program was launched—that is, it is likely that persons whom you suspect of having possible ties to terrorism will not voluntarily present themselves and self-identify as such, or more importantly, even if they do self-identify, you will get little more than false leads. In addition to the problems of Special Registration, in launching the program, then-Attorney General Ashcroft made statements that gave the impression that the ultimate plan was to expand the program to include all non-citizens in the United States.⁵¹ Rumors spread in many immigrant communities and all of these efforts worked to further drive underground an already vulnerable part of our population—the undocumented persons. Beyond frightening the undocumented population, talk of expanding the program

program, *see also* 67 Fed. Reg. 77,642-01 (Dec. 18, 2002); 68 Fed. Reg. 2,363 (Jan. 16, 2003); 68 Fed. Reg. 8,047-01 (Feb. 19, 2003); and THE 9/11 INVESTIGATIONS, *supra* note 43, at 10–14. Noticeably absent from the original list were citizens of Saudi Arabia in the United States; fifteen of the nineteen hijackers involved in the terrorist attacks on September 11 were Saudi nationals. *See* THE 9/11 INVESTIGATIONS, *supra* note 43, at 10.

48. Registration of Certain Nonimmigrant Aliens from Designated Countries, 67 Fed. Reg. at 67,766, 67,767.

49. U.S. GEN. ACCOUNTING OFFICE, HOMELAND SECURITY: JUSTICE DEPARTMENT'S PROJECT TO INTERVIEW ALIENS AFTER SEPTEMBER 11, 2001 (April 2003), *available at* <http://www.gao.gov/new.items/d03459.pdf>.

50. OFFICE OF THE INSPECTOR GENERAL, U.S. DEP'T OF JUSTICE, THE SEPTEMBER 11 DETAINEES: A REVIEW OF THE TREATMENT OF ALIENS HELD ON IMMIGRATION CHARGES IN CONNECTION WITH THE INVESTIGATION OF THE SEPTEMBER 11 ATTACKS (June 2003), *available at* <http://www.usdoj.gov/oig/special/0306/index.htm>.

51. John Broder & Susan Sachs, *Threats and Responses: The Tightening Border; Facing Registry Deadline, Men From Muslim Nations Swamp Immigration Office*, N.Y. TIMES, Dec. 17, 2002, at A20; *see also* Laura McClure, *The INS Runaround*, SLATE, Jan. 23, 2003, <http://dir.salon.com/story/news/feature/2003/01/23/registration/>.

reinforced the notion among Muslims and persons from the Middle East that they were in fact our enemies, building further enmity.

Monitoring of foreign visitors has always been problematic, not just because of the large number of persons who might have to be watched but also because any effort to monitor their activities clashes with our notions of what it means to live in a free society. For many years even before 9/11, Congress had been telling the immigration authorities that a better system needed to be put in place to keep track of visitors to the United States.⁵² The inherent tension is that much of our economy depends on the millions of visitors, students, and others who come to our shores and on the money that they spend.⁵³ Foreign students are more easily monitored since they are coming to the country to be at a fixed place.⁵⁴ The DHS uses foreign student advisors at the sponsoring institutions and places the onus on them to notify the agency if the student has not arrived or has fallen out of status.⁵⁵ Any monitoring system, however, is only as good as its weakest link and ultimately depends on how the agency deals with the information it receives.

There is no room for neglect on the part of either the Legislative or the Executive branches when it comes to matters

52. MILTON D. MORRIS, *IMMIGRATION: THE BELEAGUERED BUREAUCRACY* 88–93 (1985).

53. For example, the National Association of Foreign Student Advisors estimates that foreign students brought in more than \$12 billion in 2003–2004. *See* NAFSA: ASS'N OF INT'L EDUCATORS, *THE ECON. BENEFITS OF INT'L EDUC. TO THE UNITED STATES OF AMERICA: A STATISTICAL ANALYSIS* (2006), http://www.nafsa.org/public_policy.sec/international_education_1/economic_impact_statements (last visited Nov. 26, 2008). According to the Office of Travel and Tourism Industries of the U.S. Department of Commerce, the United States hosted 56 million tourists in 2007, with spending by the 17 million Canadian tourists amounting to \$16.1 billion. *See* http://tinnet.ita.doc.gov/outreachpages/download_data_table/Analysis_2007YTD_Arrivals.pdf (last visited Nov. 29, 2008). International visitors spent \$96.3 billion by August of 2008. <http://www.tinnet.ita.doc.gov/tinews/archive/tinews2008/20081107.html>.

54. Regulations governing the student visa process require that the student first be accepted at an educational institution which has been approved to sponsor foreigners. 8 C.F.R. § 214.2(f)(1)(i)(A) (2008).

55. This is done through a system called SEVIS. No such system exists for tourist visitors and would be impossible to operate. SEVIS was created under the Illegal Immigration Reform and Immigrant Responsibility Act (IIRAIRA), Pub. L. No. 104-208, § 641, 110 Stat. 3009 (1996). *See* 8 C.F.R. §§ 214.2(f)(1)(iii), 214.12(b)(1) (2008).

involving counterterrorism. There is little doubt but that immigration reforms must address the intersection between immigration, border security, and counterterrorism. This does not mean that a secure border will eradicate terrorism, only that an unsecure border leaves a possibility that the country may be more vulnerable to potential attacks. Border security has been a constant concern in Congress for many decades, and it is doubtful that short of complete militarization will we manage to gain complete control over the border.⁵⁶ Even with major bodies of water surrounding the country, our land borders are extensive, making them extremely difficult to control. Moreover, it does not seem that counterterrorism will be improved through legislative action—for it requires that more effective measures be taken under what are already vast law enforcement powers. ICE authorities already have broad search and seizure powers, and, once a non-citizen is found, there is a multitude of grounds for removing them.⁵⁷

Border security and prevention of potential terrorist attacks are frustrated by the dangers that result from the existence of a large and growing undocumented population. It is only logical that a population of undocumented persons, whose greatest concern is that of being discovered and deported, would be wary of coming forward to law enforcement officials. In fact, this is the very concern raised by local law enforcement in areas with large undocumented populations.⁵⁸ It is for this reason that many police departments seek to assure the population that coming forward as a witness will not result in the person being arrested, unless they have committed a crime.⁵⁹

56. Although there are many difficulties in securing the border, that does not mean nothing should be done; instead the benefits of any course of actions should be weighed against potential harms. For example, as is discussed below, increased border controls may have generated the unintended consequence of causing increases in the undocumented population. *See infra* note 85.

57. A provision requiring that all non-citizens notify the government of their address changes offers one example; failure to comply with the provision is a deportable offense. *See* 8 U.S.C. § 1227(a)(3) (2006). Under the Special Registration program, many who were otherwise not deportable but had failed to file change of address forms were referred to immigration judges. Additionally, under some circumstances the failure to register may also be a criminal offense. *See* 8 U.S.C. § 1306(b) (2006).

58. Orde F. Kittrie, *Federalism, Deportation and Crime Victims Afraid to Call the Police*, 91 IOWA L. REV. 1449 (2006).

59. Jenny Jarvie, *Citizenship Checks Strain Trust in Police* L.A. TIMES, July 29, 2007, at A16; Lornet Turnbull, *Police Toughening Stand on Illegal Immigrants*, THE

One critique of the Department of Homeland Security has been that instead of focusing on gaining cooperation from all segments of the population, they have driven the undocumented further underground.⁶⁰ As noted earlier, when Congress was unable to enact comprehensive immigration reform in 2007, immigration authorities embarked on highly publicized raids at worksites and in neighborhoods throughout the country.⁶¹ While these raids serve the purpose of convincing immigration restrictionists that the immigration laws will be enforced, they also breed fear and distrust within immigrant populations.⁶² The result of these strategies is likely to make criminal law enforcement and antiterrorism efforts more difficult.⁶³

III. AMERICA'S CHANGING DEMOGRAPHICS

Demographers predicted the changing nature of the American workforce more than twenty years ago. In 1986, in a report titled

SEATTLE TIMES, Aug. 3, 2007, at B1 (describing how local policy on how police deal with undocumented immigrants varies widely by jurisdiction).

60. Daniel J. Steinbock, *National Identity Cards: Fourth and Fifth Amendment Issues*, 56 FLA. L. REV. 697, 734 (2004); Donald Kerwin & Margaret D. Stock, *The Role of Immigration in a Coordinated National Security Policy*, 21 GEO. IMMIGR. L.J. 383, 407 (2007) ("This fact also indicates that immigration measures that target the undocumented cannot be assumed to enhance security. These measures may distract security resources from the real threat, and, more critically, they may drive the undocumented further underground.").

61. Julia Preston, *Employers Fight Tough Measures on Immigration*, N.Y. TIMES, Jul. 6, 2008 at A1 (noting a significant increase in immigration raids); Stewart M. Powell, *Immigration Official Slammed Over Crackdowns/ ICE Chief Tells Conference that Agency is Enforcing Congress' Laws*, HOUS. CHRON., Jul 30, 2008 at A4.

62. Huyen Pham, *Problems Facing the First Generation of Local Immigration Laws*, 36 HOFSTRA L. REV. 1303, 1309 (2008); Kittrie, *supra* note 58, at 1454. In addition to the effects on secondary law enforcement, there may also be economic consequences. See, e.g., Grant Schulte & Tony Leys, *Raid Takes Bite out of Kosher-Meat Supply; Processor Struggles After U.S. Sweeps Up Illegal Immigrants*, USA TODAY, Nov. 13, 2008 at 3A.

63. One of the possible motivations for stepped up enforcement could be encouraging at least a segment of the undocumented population to leave the country. Another motivation could be to provide a partial political conciliation to restrictionists, which might provide an opportunity to seek some compromise on broader reform. In the end, however, under existing law, any person who leaves the country after an extended period of unlawful status would find it nearly impossible to return to the United States legally for many years. See 8 U.S.C. § 1182(a)(9) (2006). Any person who departs the country, even voluntarily, after having been in the country illegally for more than one year and then returns again without permission is permanently barred from gaining legal status.

Workforce 2000, a study commissioned by the U.S. Department of Labor, predicted what we now describe as a global economy.⁶⁴ The report projected that by the year 2000 the major growth areas in the labor market would be in the service sectors, and that dramatic reductions would be seen in manufacturing jobs.⁶⁵ Indeed, what we have seen is that organized labor has seen its most important successes in the service sectors,⁶⁶ particularly in occupations with larger numbers of immigrant workers.⁶⁷ These changes have created a sense of unease and tension among the workers dislocated by the shifting labor trends, with citizen workers blaming immigrants for their sense of economic dislocation.⁶⁸ At the same time, the changing demographics of the general population have also influenced the public attitudes on immigration.⁶⁹ This change was also predictable. In 1987, political scientist Ben Wattenberg, in his book "The Birth Dearth," described an America with a shrinking population caused by lower birth rates.⁷⁰ He described how, as the population became increasingly more urbanized and educated, birth rates would fall, creating a demand for immigrant workers to fill positions needed to support a population that was living longer and retiring earlier.⁷¹ Many of these predictions have been borne out—manufacturing jobs have been on the decline and the service sector industry has seen the largest growth.⁷² Another change is that those with less education have less employment security, and there are larger gaps between income groups.⁷³ What

64. The study was later published as William B. Johnston & Arnold E. Packer, *WORKFORCE 2000 WORK AND WORKERS FOR THE 21ST CENTURY* (1987).

65. *Id.* at 53.

66. Pegg R. Smith, *Welfare, Child Care, and the People Who Care: Union Representation of Family Child Care Providers*, 55 U. KAN. L. REV. 321, 322 (2007).

67. See Ruben J. Garcia, *Labor's Fragile Freedom of Association Post-9/11*, 8 U. PA. J. LAB. & EMP. L. 283, 324 (2006).

68. Immigrant workers have also been blamed for the 9/11 attacks. *Id.* at 318 n.155 and accompanying text.

69. Max J. Pfeffer, *The Underpinnings of Immigration and the Limits of Immigration Policy*, 41 CORNELL INT'L L.J. 83, 87–88 (2008).

70. BEN J. WATTENBERG, *THE BIRTH DEARTH* (1987).

71. *Id.* at 22–25.

72. Toby Parcel, *Labor Economics: The New Modern Times: Factors Reshaping the World of Work*, 50 INDUS. & LAB. REL. REV. 166 (1996) (book review); Jared Bernstein & Lawrence Mishel, *The Growth of the Low-Wage Labor Market: Who, What, and Why*, 3 KAN. J.L. & PUB. POL'Y 12, 19 (1994).

73. Linda Beale, *Congress Fiddles While Middle America Burns: Amending the AMT (and Regular Tax)*, 6 FLA. TAX REV. 811, 829 nn.56–57 (2004) (describing a greater gap between rich and poor).

has also occurred is that employers in the service, agricultural, and high tech sectors are finding it increasingly difficult to fill open positions relying solely on domestic workers.⁷⁴ The economic dislocations of this increasingly global economy have increased the sense of insecurity among the less educated and skilled in our population.⁷⁵ This insecurity has been a breeding ground for increasing nativist sentiments. Restrictionists have seized upon the economic dislocation to argue against legalization and other immigration reforms.⁷⁶ These obstacles to positive reform were described by Dale Maharidge in his book *The Coming White Minority: California's Eruptions and the Nation's Future*, written in 1996, in which he explained that there was a strong racial component to many of our national conversations.⁷⁷ He offered that America was in the process of a cultural and racial change and that this was resulting in a number of political changes, the most notable of which were the anti-affirmative action and anti-immigrant initiatives seen in California.⁷⁸

The changes and the reactions to them which I have described have historical precedence in the United States. The period beginning with the end of slavery in the 1860s and the industrial revolution and the rapid growth in immigration which began in the early 1900s mirrors the immigration patterns we are witnessing today. The early 1900s was a period in which people began moving in unprecedented numbers, largely from Europe to the "New

74. See Dan Frosch, *Inmates Will Replace Wary Migrants in Colorado Fields*, N.Y. TIMES, Mar. 4, 2007, at A1; Roger Waldinger & Christopher L. Erickson, *Temporarily Foreign? The Labor Market for Migrant Professionals in High-Tech at the Peak of the Boom*, 24 COMP. LAB. L. & POL'Y J. 463, 465 (2003); SUZETTE BROOKS MASTERS & TED RUTHIZER, THE H-1B STRAITJACKET: WHY CONGRESS SHOULD REPEAL THE CAP ON FOREIGN-BORN HIGHLY SKILLED WORKERS (Ctr. for Trade Studies at the Cato Inst., Trade Briefing Paper No. 7, 2000).

75. One author noted this animus in the racial and penal contexts as arising from the belief of "angry white males . . . that there is an 'undeserving poor'—consisting of welfare recipients, *recent immigrants*, beneficiaries of affirmative action, and criminals." James D. Unnever et al., *Race, Racism and Support for Capital Punishment*, 37 CRIME & JUST. 45, 65 (2008) (emphasis added) (quoting Michael Hogan, et al., *Economic Insecurity, Blame, and Punitive Attitudes*, JUST. Q. 22 (3) 392, 405 (2005)).

76. Arthur A. Baer, *Latino Human Rights and the Global Economic Order*, 18 CHICANO-LATINO L. REV. 80, 95–96 (1996).

77. DALE MAHARIDGE, *THE COMING WHITE MINORITY: CALIFORNIA'S ERUPTIONS AND THE NATION'S FUTURE* (1996).

78. See *id.* at 156–59.

World.”⁷⁹ The major differences between these two periods were the transformation in how people traveled, the speed of communication, and the amount of economic interdependence. In the past, people traveled largely by land and sea, whereas today travel is predominantly by air. Similarly, in the past communications were by mail, whereas now we receive our news and information nearly instantaneously through television and the internet. These changes in the forces of migration have had an impact on the numbers of people who are migrating. Even with these dramatic changes in the forces of migration, we could be entering a period of economic downturn which rivals the Great Depression. If this in fact is the case, we would likely see an increase in reverse migration, or emigration.⁸⁰

IV. A GROWING UNDOCUMENTED POPULATION

The term “undocumented” is a reference to any person who might be in the country with an unauthorized or illegal status.⁸¹ This would include persons who entered the country illegally or without permission, or those who entered legally and then failed to depart or extend their status when required.⁸² According to some estimates, the size of this population could be as high as 11 million.⁸³ It would be useful to understand why we have a large undocumented population, which perhaps may lead to a query whether the present size of this population is large when measured

79. STATISTICS ON U.S. IMMIGRATION: AN ASSESSMENT OF DATA NEEDS FOR FUTURE RESEARCH 31 (Barry Edmonston ed., 1996); see L. EDWARD PURCELL, IMMIGRATION 85–86 (1994).

80. This is precisely what happened following the stock market crash of 1929 and the Great Depression. Large numbers of immigrants left the United States and returned to their home countries. See Purcell, *supra* note 79, at 85–86.

81. The term is used in place of the more offensive term “illegal alien.” Kevin Johnson describes the term “alien”—and particularly the term “illegal alien”—as dehumanizing and racist. See Kevin R. Johnson, *A “Hard Look” at the Executive Branch’s Asylum Decisions*, 1991 UTAH L. REV. 279, 281 n.5 (1991).

82. Persons who remain longer than authorized are subject to removal for “failure to maintain” their nonimmigrant status. See 8 U.S.C. § 1227(a)(1)(C) (2006); BOSWELL, *supra* note 8, at 62.

83. While past estimates of the undocumented population were considered very inaccurate, recent estimates are viewed as more reliable. The estimates of the undocumented vary widely but one respected demographer estimates that the population reached approximately 11 million in March 2005. JEFFREY S. PASSEL, Pew Hispanic Ctr., *Estimates of the Size and Characteristics of the Undocumented Immigrant Population* 6 tbl.1 (2005), <http://pewhispanic.org/files/reports/44.pdf>.

against the total of our inhabitants or how the population measures against the total demand for immigrants.

People come to this country for a multitude of reasons, including economic advancement, family unification, and refuge.⁸⁴ Indeed, the forces of migration are no different for the United States than they are for any other country in the world.⁸⁵ Surely an examination of why a person decides to move from one place to another does not find that the decision is based on one single reason, but consists of a multitude of forces. Migration rates can be affected by the ease with which the undocumented find work or if the migrants are seeking to be reunited with close family members. Another less predictable migration force is political conflict such as a civil war or political unrest.

At least since the “Bracero Program” ended in 1964 the United States has had a more recognizable and growing number of “undocumented” persons within its borders.⁸⁶ Under the program, which was instituted in 1942 during World War II, “temporary” Mexican workers were brought into the country to alleviate labor shortages resulting from the war effort.⁸⁷ The workers were only

84. The immigration laws provide for persons who wish to immigrate for purposes of working, joining family members or when they are fleeing persecution. See 8 U.S.C. §§ 1153(a), 1153(b), 1157, and 1158 (2006). The law also prohibits persons from being admitted if they are deemed “likely to become a public charge.” See 8 U.S.C. § 1182(a)(4) (2006).

85. See Elizabeth M. Bruch, *Models Wanted: The Search for an Effective Response to Human Trafficking*, 40 STAN. J. INT’L L. 1, 7 n.28 (2004).

86. ELLIOTT ROBERT BARKAN, AND STILL THEY COME: IMMIGRANTS AND AMERICAN SOCIETY 1920 TO THE 1990S 124 (Harlan Davidson 1996). One could argue the Bracero program, which allowed for cheap labor in a relatively steady supply and created the fiction of the legal migrant, for the foreign worker was subject to the same potential for abuse. See ARISTIDE R. ZOLBERG, A NATION BY DESIGN: IMMIGRATION POLICY IN THE FASHIONING OF AMERICA 341–42 (Harvard University Press 2006). The data used for determining the number of undocumented persons in the United States at any given time in our history is not easily obtainable. For an insightful exploration of the topic see ILLEGAL IMMIGRATION IN AMERICA: A REFERENCE HANDBOOK (David W. Haines & Karen E. Rosenblum eds., Greenwood Press 1999).

87. Agreement of August 1942, For the Temporary Migration of Mexican Agricultural Workers to the United States, as Revisited on April 26, 1943 by an Exchange of Notes Between the American Embassy at Mexico City and the Mexican Ministry of Foreign Affairs, <http://www.farmworkers.org/bpaccord.html>. Nearly 1 million Bracero workers deemed to no longer be qualified under the program were rounded up and deported in “Operation Wetback,” instituted in 1954. JoAnne D. Spotts, *U.S. Immigration Policy on the Southwest Border from Reagan through Clinton, 1981–2001*, 16 GEO. IMMIGR. L.J. 601, 605 (2002).

allowed to remain in the United States as long as they continued to work for their farm labor employers.⁸⁸ While the program ended as a result of widespread human rights abuses, the need for workers was not abated and people continued to come, except that they did not have legal status.⁸⁹ The growing pressure to deal with the flow of undocumented persons provided the impetus in 1986 for instituting laws that imposed sanctions against employers who hired them.⁹⁰ Even when an unauthorized person was hired, however, the law protected employers from sanctions unless the government could show that the employer knew that the person was unauthorized.⁹¹ The statute provided further protection to an employer as long as the employer viewed relatively easily obtained documents for the worker when the employer hired the worker.⁹² Few would argue that undocumented persons would continue to come to the United States if they were unable to find work, and few businesses would argue that they should be held responsible for the enforcement of the immigration laws. In the United States system, employers see their primary responsibility as generating profits. This country has lived and thrived on an undocumented immigrant population for decades with the primary variable over the years being its size.⁹³ When viewed historically, U.S. immigration policy has been one of waves of migration punctuated by periodic amnesties followed by new periods of increased migration.⁹⁴ The

88. By the end of the program approximately 4.6 million temporary workers had come to the United States. Maria Elena Bickerton, *Prospects for a Bilateral Immigration Agreement with Mexico: Lessons From the Bracero Program*, 79 TEX. L. REV. 895, 909 n.19 (2001).

89. Kitty Calavita, *U.S. Immigration Policy: Contradictions and Projections for the Future*, 2 IND. J. GLOBAL LEGAL STUD. 143, 146 (1994).

90. Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, § 101, 100 Stat. 3359, 3360.

91. See 8 U.S.C. §§ 1324a(a)(1), (2) (2005 & Supp. 2008).

92. See 8 U.S.C. § 1324a(a)(3) (2005). The law provided additional defenses to sanction violations. 8 U.S.C. §§ 1324a(a)(4)–(6) (2005 & Supp. 2008).

93. The numbers of undocumented persons present in the United States in 1986 were as high as six million. The number in 1990 and 1996, according to one study, was 3.4 and 5.1 million respectively. The estimated number of Bracero workers between 1942 and 1964 was several million. See DAVID M. BROWNSTONE & IRENE M. FRANCK, *FACTS ABOUT AMERICAN IMMIGRATION* (H.W. Wilson 2002); *ILLEGAL IMMIGRATION IN AMERICA: A REFERENCE HANDBOOK* (David W. Haines & Karen E. Rosenblum eds., Greenwood Press 1999) (referencing JEFFREY S. PASSEL, *UNDOCUMENTED IMMIGRATION TO THE UNITED STATES: NUMBERS, TRENDS AND CHARACTERISTICS* 28–31).

94. Examples of these “amnesties” can be found in the McCarran–Walter Act,

population of migrants has tended to increase during periods of prosperity and to wane in periods of economic decline.⁹⁵

When immigration is based on family unification, it poses a different and more complex problem. The United States, like most countries, allows foreigners to immigrate when they are the immediate family members of U.S. citizens, lawful permanent residents, or are immediate family members of persons who fall into these two categories.⁹⁶ The underlying basis for this policy of family unification is supportable by humanitarian and pragmatic reasons and has long been part of our immigration laws. This policy is justified in part because of the greater social stability of immigrants being with their family members rather than living apart.

While family-based immigration forms the core of the immigration laws of most countries, in the United States the quota restrictions on migration cause long waits for many who are seeking legal status based on family relationship with a permanent resident or U.S. citizen.⁹⁷ Another serious problem is the length of time that legal immigrants must wait in order to get their status.⁹⁸ This extended delay in obtaining status can serve as a force for migration on one hand or compel others to violate the

Pub. L. No. 82-414, 66 Stat. 163 (1952), which provided legal status for those who had been in the United States before 1948, a date that was later moved to 1972 upon the enactment of the 1986 Amnesty legislation, Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, § 203, 100 Stat. 3359, 3405. None of these legislative measures was described as “amnesty;” rather, they are defined as “registration.” Other provisions of the immigration laws provide a mechanism for a long-term, undocumented person to obtain permanent residency. This was earlier characterized as “suspension of deportation;” it appears under the present statute as “cancellation of removal.” 8 U.S.C. § 1254(a)(1) (2006) (suspension of deportation); 8 U.S.C. § 1229b (2006) (cancellation of removal).

95. See Harry Valetk, *I Cannot Eat Air! An Economic Analysis of International Immigration Law for the 21st Century*, 7 CARDOZO J. INTL. & COMP. L. 141, 145 (1999); Angelo N. Ancheta, *Our Immigrant Heritage: A Struggle for Justice*, 2 UCLA ASIAN PAC. AM. L.J. 102, 102–03 (1994).

96. 8 U.S.C. § 1153(a) (2006). For a more comprehensive description of the immigrant visa allocation process see BOSWELL, *supra* note 8, at 123–31 (2006).

97. BOSWELL, *supra* note 8, at 130–31. The family-based immigrant categories include: spouses and unmarried children of permanent residents, adult children, and siblings of U.S. citizens. 8 U.S.C. § 1153(a)(1)–(4) (2006). The U.S. Department of State tracks the issuance of visas in all categories and makes them available. See Visa Bulletin for December 2008, http://travel.state.gov/visa/frvi/bulletin/bulletin_1360.html (last visited Nov. 30, 2008).

98. BOSWELL, *supra* note 8, at 130–31.

immigration laws that are separating families on the other.

While some immigrate for purely family reasons, others come because of physical proximity, cultural ties, or for family relations created as a product of military entanglements.⁹⁹ It should therefore not be strange that we have many immigrants from Mexico or Canada. Nor should it be surprising that a relatively large number of immigrants have come from countries such as Korea, Taiwan, and the Philippines.¹⁰⁰ Each of these countries has historical ties with the United States that have been shaped by wars or political conflicts.¹⁰¹ The migration patterns were shaped by the Philippines having been a U.S. territory from the turn of the twentieth century until after World War II, the Korean Wars of the 1950s, and the political conflicts with China following the rise of Mao Tse Tung. The United Kingdom witnessed similar migration patterns which no doubt occurred because of the expansive reach of the British Empire.¹⁰² It is therefore likely that, as long as the United States remains a major superpower, it will be faced with strong immigration pressures.

Another problem alluded to earlier is that foreigners having family ties with citizens or permanent residents must wait for extended periods of time before they are able to gain legal status.¹⁰³ These lengthy periods create serious legal complications if the person is in the United States. The delays will mean that many potential immigrants are forced to make the choice between leaving their country or remaining with their loved ones in the United States and running the risk of later being unable to gain legal status when their time comes to receive an immigrant visa under the quota system.¹⁰⁴ Their ineligibility for an immigrant visa

99. THREATENED PEOPLES, THREATENED BORDERS: WORLD MIGRATION & U.S. POLICY 117 (Michael S. Teitelbaum & Myron Weiner eds., W. W. & Norton Co. 1995).

100. *Id.* at 118.

101. *Id.* at 119.

102. THE OXFORD HISTORY OF THE BRITISH EMPIRE HISTORIOGRAPHY 183–86 (William Roger Louis, et al. eds., Oxford University Press 2001).

103. See BOSWELL, *supra* note 8, at 130–31.

104. The erosion of discretion spans several years. For example, prior to amendments in 1990, trial courts could grant judicial recommendations against deportation, which would remove a crime as a ground of deportability. See Immigration Act of 1990, Pub. L. No. 100-690, § 505, 104 Stat. 4978, 5050. Beginning in 1988 Congress began expanding the definition of aggravated felonies and then prevented persons convicted of these crimes from any forms of immigration relief. See Anti-Terrorism and Effective Death Penalty Act of 1996,

will be due to the fact that they have been unlawfully in the United States for longer than 180 days or were unable to maintain legal status before their immigrant visa became available under the quota system.¹⁰⁵ Others who are outside the United States are forced to wait for extended periods of time while being separated from their loved ones.¹⁰⁶ For those who are waiting outside to be reunited with their loved ones, the extended delays become a strong force to illegally enter the country.¹⁰⁷ For others who are already here illegally, stricter border enforcement actually keeps them in the United States, creating the curious phenomena that many undocumented persons are afraid to leave because of the difficulties in returning.¹⁰⁸

For many, this means being separated from loved ones and for others it means living in constant fear of being discovered. Those who practice immigration law know that it can take nearly a lifetime for a U.S. citizen to bring in their non-citizen sibling.¹⁰⁹ The wait for a lawful permanent resident to bring in his or her

Pub. L. No. 104-132, 110 Stat. 1214; Illegal Immigration and Immigrant Responsibility Act of 1996, Pub. L. No. 104-207, 110 Stat. 3009; Immigration and Nationality Technical Corrections Act of 1994, Pub. L. No. 103-41, 108 Stat. 4305; Omnibus Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, subtitle J, 102 Stat. 4181, 4469. Later in 1996, further amendments restricted immigration relief known as suspension of deportation by changing the standard for hardship from “extreme hardship” to “extremely exceptional and unusual hardship.” See 8 U.S.C. § 1229b(b)(1)(D) (2006). The law also restricted the benefit to 4,000 applicants per year. 8 U.S.C. § 1229b(b)(3) (2006).

105. 8 U.S.C. § 1182(a)(9)(B) (2006). A person who has been unlawfully present for more than 180 days is inadmissible and therefore ineligible for permanent residency for 3 years. 8 U.S.C. § 1182(a)(9)(B)(i)(I) (2006). If they have been unlawfully present for one year or more they are barred for 10 years. 8 U.S.C. § 1182(a)(9)(B)(i)(II) (2006). These provisions do not apply to persons who are eligible for “adjustment of status.” See 8 U.S.C. § 1255 (2006). Adjustment, however, is a narrowly defined benefit that requires that the person has entered with a visa and maintained their status and has not worked without permission. See 8 U.S.C. §§ 1255(a), (c) (2006). A person may still adjust his or her status if he or she is: married to a U.S. citizen, the minor child of a U.S. citizen, or the parent of an adult United States citizen (as long as the person entered the country lawfully). See 8 U.S.C. § 1255(j) (2006).

106. 8 U.S.C. § 1229b(b)(3) (2006).

107. Camille J. Bosworth, *Guest Worker Policy: A Critical Analysis of President Bush's Proposed Reform*, 56 HASTINGS L.J. 1095, 1106 (2005).

108. See Bill Ong Hing, *The Case for Amnesty*, 3 STAN. J. C.R. & C.L. 233, 233–37, 275 (2007). Stricter border enforcement also creates a situation making border crossing more expensive and dangerous. See *id.*

109. See BOSWELL, *supra* note 8, at 123–36.

children or spouse can be from four to five years.¹¹⁰ It may take more than five years for the unmarried children of U.S. citizens to immigrate legally.¹¹¹ The waiting period will be longer if the beneficiary is the married son or daughter of a U.S. citizen and even longer if he or she happens to be from the Philippines or Mexico.¹¹² These waiting periods are getting longer partially due to the rigid immigrant quota system and the increased demand for visas caused by a rapidly changing and global economy.¹¹³

Interestingly, these pressures have caused Congress and the Executive branch to place stricter controls on immigration. The recent trend of immigration enactments has been to make it easier for a person to lose his status or to be removed by taking away discretion from immigration judges and officers to waive grounds of inadmissibility and deportability.¹¹⁴ It should therefore not be surprising that the undocumented population is increasing in size, for the patterns of immigration appear to be driven more by economic and human forces than by the laws which would hope to control them.

The statutory and administrative scheme that employers must maneuver to hire foreign workers legally has its origins in a time that has long since passed.¹¹⁵ The system, known as the labor certification process, is constructed around a scenario where a U.S.

110. See *id.* at 128–31.

111. See *id.*

112. The time references are estimates based on reviews of the waiting periods for permanent residency that are maintained by the U.S. Department of State. See BOSWELL, *supra* note 8, at 129–31. The State Department's lists are issued in a monthly visa bulletin that can be found at http://travel.state.gov/visa/frvi/bulletin_1360.html (last visited Nov. 25, 2008).

113. Following the impasse on comprehensive reform, Congress and the Bush administration shifted their efforts to focusing on enforcement. This took the form of constructing a controversial border "fence" and increasing enforcement both along the border and in the interior of the country. In 2006 Congress had enacted the Secure Fence Act of 2006, Pub. L. No. 109-367, § 3, 120 Stat. 2638, 2638. Following the legislative impasse, Congress fully funded the program, increasing by three times the number of border patrol officers and significantly expanding the already existing border wall. See Department of Homeland Security Appropriations Act of 2007, Pub. L. No. 109-295, 120 Stat. 1355, 1359–60 (2007).

114. 8 U.S.C. § 1229a(c) (2008).

115. See Edward Rubin & Mark Mancini, *An Overview of the Labor Certification Requirement for Immigrants*, 14 SAN DIEGO L. REV. 76, 77 (1976); see also BOSWELL, *supra* note 8, at 142–46. While certification processing has improved through administrative revisions created in 2005, the central elements of the process have not changed.

employer who wishes to hire an otherwise unauthorized foreign worker advertises the position for which the worker is seeking certification and, if no qualified U.S. citizen worker responds, the employer is eligible to petition the government for permission to consider the foreign person for possible qualification as an immigrant.¹¹⁶ While on its face the process seems relatively simple, even a routine case can take more than a year and many take much longer.¹¹⁷ This means that if the worker is outside the United States, the position will remain unfilled. In the more common situation where the person is inside the United States, the foreign worker can only work legally for the employer if there is a suitable nonimmigrant or temporary visa category into which the person fits.¹¹⁸ If the employer decides to hire the person, she risks running afoul of the immigration laws and exposing herself to sanctions. If the foreign worker is not in a legal immigration status, the worker will be required to leave the country, reapply for admission, and face being ineligible for admission because the worker was previously in an unlawful status for more than 180 days.¹¹⁹

While immigration controls are designed to force employers to hire U.S. citizen workers, the result is unsatisfactory if the employer is unable to find a citizen worker, such as in periods of economic growth when unemployment rates are low. The reality is that many employers hire foreign workers because they need them to maintain their businesses—to produce goods or services. Under existing immigration laws, many undocumented workers, while engaged in work which benefits the national economy, have no prospect of becoming legal for they are barred from being able to become legal through their employer's sponsorship even if they are not displacing a U.S. citizen worker.¹²⁰

The fact that an employer in the United States needs a worker or that a person has close family members in the United States is a

116. BOSWELL, *supra* note 8, at 142–46.

117. *Id.*

118. Where there is the future prospect of an immigrant visa, the employer could only sponsor the person for a position in a highly skilled position or as an executive or manager in a multinational corporation. *See* 8 U.S.C. § 1101(a)(15)(H)(i)(B), (L) (2006).

119. 8 U.S.C. § 1182(a)(9)(B) (2006).

120. The same barriers to lawful status for the family-based immigrant make it difficult for the immigrant who is sponsored by an employer. If the person is not in status, or has been out of status for more than 180 days or 1 year, he or she will face bars to admission that may not be waived. *See supra* note 105.

powerful force for immigration.¹²¹ A system that places unrealistic procedural impediments or caps on the number of these people who can enter the country will only lead them to find other ways to enter. The immigrant quotas have not been sufficiently modified to meet the demand for visas during the late twentieth century, let alone for the twenty-first century. The nation's need for immigrants has increased since the immigrant quotas were established.¹²²

What all of this points to is that immigration is an important part of the nation's economic expansion. With a population that is living longer, retiring earlier and having fewer children, immigration may be part of how we will be able to remain economically competitive. The economic landscape can shift quickly, and businesses require changes that respond to those shifts. An immigration policy that is inflexible or difficult to adapt to changing market forces could cause businesses to relocate to environments that are more hospitable if the businesses are unable to fill important positions.¹²³ It is only logical that businesses will move with the market forces to environments that are more hospitable—it seems likely, therefore, that an immigration policy that is more hospitable to the needs of business would encourage those businesses to take advantage of that environment.

United States businesses, particularly those in high-tech fields, have been trying to change the immigration laws that they see as impeding their ability to hire the skilled workers that they need.¹²⁴

121. Work has always been a “pull” factor causing people to come to this country. The phenomenon exists in other countries as well. See Theresa Lawson, *Sending Countries and the Rights of Women Migrant Workers: The Case of Guatemala*, 18 HARV. HUM. RTS. J. 225, 227 (2005).

122. Muzaffar Chishti, *A Redesigned Immigration Selection System*, 41 CORNELL INT'L L.J. 115, 122 (2008).

123. Obviously, there are many reasons why a business might be located in a particular area. It is only logical that when markets are competing for businesses that require particular kinds of workers and those conditions are found elsewhere, businesses will move where workers are more plentiful, all other factors being equal. Recently, the German government modified some of its immigration laws relating to employment of skilled workers because workers were moving to the United Kingdom, which had more hospitable procedures. See Joseph Tiger, *German Immigration System Opens Doors to Skilled Workers*, 22 GEO. IMMIGR. L.J. 367, 368 (2008).

124. See Eustace T. Francis, *Taking Care of Business: The Potential Impact of Immigration Reform on Corporate Strategic Planning*, 5 GEO. IMMIGR. L.J. 79, 105–108 (1991).

In 1990, changes were made to the employment-based immigration system. These changes expanded the number of employment-based immigrant visas and made it easier for employers to hire and recruit skilled nonimmigrant workers.¹²⁵ But these efforts were only partial solutions; from 1997 to 1999 the annual quota for the admission of these more highly skilled workers was exhausted before the end of the fiscal year.¹²⁶ This means that employers must still maneuver through a maze of complicated immigration laws in order to try to fill positions for which there are no available U.S. citizen workers.

V. PROPOSED REFORMS

Kevin Johnson, in his excellent book *Opening the Floodgates: Why America Needs to Rethink its Borders and Immigration Laws*, makes a persuasive argument for open borders.¹²⁷ While sharing many of the views presented by Johnson, my attempt here is much more modest. That is, I would not propose to eradicate the family- and employment-based immigration systems but, rather, would propose to modify them severely.¹²⁸ My suggestions for reform are grounded in a pragmatic argument that the current system, which countenances large numbers of undocumented persons, is unsustainable, particularly when security is of great concern. In essence, reform should attempt to fashion an immigration system that is less vulnerable to compromise and that also serves our overall national interests. My proposals attempt to address the problem of the large undocumented population living in this country, and to create an immigrant visa system which satisfies the demand for family unification and for an adequate labor force.

First, there must be a mechanism to bring as many of those who are living in the underground shadows into some type of legal status where they are less vulnerable to being victimized and more likely to cooperate with law enforcement. Second, we must reduce

125. Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978 (codified at 8 U.S.C. § 1101, *et seq.* (2006)).

126. Jung S. Hahm, *American Competitiveness and Workforce Improvement Act of 1998: Balancing Economic and Labor Interests Under the New H-1B Visa Program*, 85 CORNELL L. REV. 1673, 1682–88 (2000).

127. See KEVIN R. JOHNSON, *OPENING THE FLOODGATES: WHY AMERICA NEEDS TO RETHINK ITS BORDERS AND IMMIGRATION LAWS* (Critical America 2007).

128. *Id.* at 37.

the incentives to join the ranks of the undocumented by addressing the forces that make people move in the first place. Third, we must create a system for legal migration that preserves family unification for immigrants and fills occupations for which workers are not in sufficient supply.

A. *Reducing the Underground Population*

While an amnesty can help deal with the problem of having a large undocumented population, in order for it to be comprehensive it must be uncomplicated. The 1986 amnesty missed large numbers of people by its very complexity.¹²⁹ For example, those who could not prove that they had been in illegal status for the nearly six years preceding the application date or who had significant breaks in their physical presence were disqualified.¹³⁰ Applicants were also required to prove that they had been in the United States illegally for the period proceeding January 1, 1982, until the date on which they filed their application. In addition, each individual person in the family was required to qualify separately for the amnesty.¹³¹ These requirements resulted in extensive efforts by the government to screen each applicant. Many applicants were denied and were later placed in proceedings. It is not known how many of these applicants eventually obtained legal status through one of the other forms of legal relief. Eventually, those who were granted legalization and permanent residence, and later citizenship, became eligible to petition for family members. Those who were unable to qualify for the 1986 legalization may still attempt to qualify for other forms of immigration relief, further taxing the immigration system.¹³² The

129. Estimates of the number of undocumented persons in the United States at the time of the 1986 amnesty program ranged from 3.6 to 4.8 million; another estimate was as high as 6 million. *Immigration Control and Legalization Amendments: Hearings on H.R. 3080 Before the Subcomm. on Immigration and International Law of the House Comm. on the Judiciary*, 99th Cong. 1st Sess. 45, 47 (1985); NATIONAL ACADEMY OF SCIENCES, *IMMIGRATION STATISTICS: A STORY OF NEGLECT* 87–88 (1985). One commentator noted that the number of persons who were granted amnesty was approximately 1.6 million. See Susan Gonzalez Baker & Frank D. Bean, *The Legalization Programs of the 1986 Immigration Reform and Control Act: Moving Beyond the First Phase*, in 7 *IN DEFENSE OF THE ALIEN* 3, 3 (Lydio F. Tomasi ed., Center for Migration Studies 1990).

130. 8 U.S.C. § 1255a(a) (2006).

131. *Id.* See also *supra* note 18.

132. The forms of immigration relief would depend on the person's individual

problems with the most recent comprehensive reform package introduced in the Congress was that it was not clear how many of the estimated eleven million undocumented people would qualify and the procedure for qualifying was very complicated.¹³³

The most effective legalization program is one that captures as many of the undocumented as possible using the least complicated procedures. Since 1929, Congress has periodically used a form of immigration relief called “registry” to address the problems of persons who were considered deserving of amnesty-like protection.¹³⁴ The registry date has been moved up a number of times as the immigration laws have been amended over the years. In 1986, with the enactment of the amnesty provisions, the registry was moved to January 1, 1972.¹³⁵ Under registry, a person who has been continuously residing in the United States since before the date provided in the statute and is able to show that he or she is of good moral character and not inadmissible for national security or criminal grounds may be granted permanent resident status. Registry would be a relatively uncomplicated procedure which, if brought to the present, could provide a legal mechanism for more efficient adjudication. This would mean that anyone who had maintained continuous residence from the date in the statute would qualify for this new amnesty as long as he or she were of good moral character and had not been convicted of any crimes.

Anything short of a simplified procedure will leave us as we were at the conclusion of the last amnesty program, which was that large numbers of undocumented remained in the shadows.¹³⁶

circumstances. For example, if the person has been in the United States for more than ten years, is able to show that his or her spouse or child is a U.S. citizen or permanent resident, and would suffer extremely exceptional and unusual hardship, he or she might be able to avoid deportation. *See supra* note 97.

133. Comprehensive Immigration Reform Act of 2007, S. 1639, 110th Cong. (2007). The bill would have required those who were seeking its benefit to leave the country to wait for their status to become available at some date in the future. Moreover, it did not correct the problems in the immigration selection scheme, such as the extensive backlogs, meaning that after departing the country the applicant would have to wait an extended period of time.

134. The first time that registry was used it provided the equivalent of permanent resident status to persons who had entered the United States before the first quota laws of 1921. *See* Act of Mar. 2, 1929, ch. 536, 45 Stat. 1512; *see also* CHARLES GORDON, STANLEY MAILMAN & STEPHEN YALE-LOEHR, *IMMIGRATION LAW & PROCEDURE* § 1.03(4)(c) (2008).

135. *See* 8 U.S.C. § 1259 (2006).

136. Karen A. Woodrow & Jeffrey S. Passel, *Post-IRCA Undocumented Immigration*

Those who do not qualify for whatever amnesty is enacted would likely defend themselves from removal by making applications for whatever immigration relief might be available, such as cancellation of removal. In turn, their applications would only burden the immigration courts with the responsibility of adjudicating the petitions, taking away valuable time from dealing with more serious violations such as those involving criminal grounds of removal.¹³⁷

B. Dealing with the Forces of Migration

Human beings have been on the move since the beginning of time. Immigration laws attempt to control that movement, yet the most effective laws are those that recognize the limits of these attempts at controlling the most natural of human behaviors. While migration will forever be a part of the human existence, proper recognition must be given to those forces which motivate people to move. As noted earlier, the forces include, but are not limited to, family unification, economic advancement, and political strife.¹³⁸ The most neglected of these three areas are those involving forces of economic advancement and political strife. When war or civil unrest breaks out, migration is inevitable. This can be seen most vividly in the current war in Iraq, which sent millions of Iraqi refugees to Jordan, Syria, Iran, Turkey and other countries.¹³⁹ A similar phenomenon also happened at the conclusion of the war in Southeast Asia, and during the civil wars of the 1980s in Central America.¹⁴⁰ While the migration impact on the United States as a result of these political upheavals was much less than that experienced in neighboring countries, it was nonetheless

to the United States: An Assessment Based on the June 1988 CPS, in UNDOCUMENTED MIGRATION TO THE UNITED STATES: IRCA AND THE EXPERIENCE OF 1980s 33, 55 (Frank D. Bean, Barry Edmonston & Jeffrey S. Passel eds., Urban Institute Press 1990).

137. See 8 U.S.C. § 1227(a)(2) (2006).

138. See *supra* note 84 and accompanying text.

139. The vast majority of Iraqi refugees fled to Jordan and Syria, with others in Iran, Turkey and Egypt. Syria hosted more than one million and Jordan nearly 700,000. See KRISTÈLE YOUNÈS, REFUGEES INTERNATIONAL, IRAQ: U.S. RESPONSE TO DISPLACEMENT REMAINS INADEQUATE (2007), http://www.refugeesinternational.org/sites/default/files/RI_Iraqreport.pdf.

140. Sharon Stanton Russell, *Migration Patterns of U.S. Foreign Policy Interest, in* THREATENED PEOPLES, THREATENED BORDERS: WORLD MIGRATION & U.S. POLICY 39, 73-75 (Michael S. Teitelbaum & Myron Weiner eds., W.W. Norton and Co.1995).

strong.¹⁴¹

While political conflict and unrest is usually accompanied by economic distress, which in turn sets off an exodus of segments of the population, economic stability and opportunity is the greatest force that can counteract these migration forces.¹⁴² It is therefore in our interest to encourage economic growth throughout the world, for most people presented with the opportunity to stay in their native country will choose the stability of remaining at home. While much of our foreign aid is focused on creating opportunities for U.S. businesses or sustaining foreign elites,¹⁴³ it would better serve our long-term national interests to support land reform and economic development, thereby giving people a reason to remain in their home countries. Indeed, the European Union is beginning an effort of this type which is aimed at dealing with some of the forces that cause many African migrants to seek opportunities in Europe.¹⁴⁴

Another challenge, addressed earlier, was the long waiting period for an immigrant under the quota system.¹⁴⁵ As previously discussed, someone who is married to a lawful permanent resident must wait for a long period of time before he can immigrate to this country, thereby creating another force for migration.¹⁴⁶ The problem is worse for children and spouses of lawful permanent residents and the married and unmarried adult children of U.S. citizens.¹⁴⁷

Similar but less pronounced problems are seen when employers wish to hire foreign workers who do not displace U.S.

141. Neighboring countries generally receive the major force of refugee movement. See James C. Hathaway & R. Alexander Neve, *Making International Refugee Law Relevant Again: A Proposal for Collectivized and Solution-Oriented Protection*, 10 HARV. HUM. RTS. J. 115, 141 (1997).

142. See Eleanor E. Downes, *Fulfilling the Promise?: When Humanitarian Obligations and Foreign Policy Goals Conflict in the United States*, 27 B.C. THIRD WORLD L.J. 477, 485 (2007) (book review).

143. Gayle Smith, *The Politics of Aid*, 35 HUM. RTS. 2, 2 (2008).

144. In a speech by President Sarkozy of France given in South Africa, he described a development of a new policy on immigration that would focus on mutual economic development. Nicolas Sarkozy, *Europe Can No Longer Afford to Take Continent for Granted* (March 12, 2008), <http://policyhousekenya.wordpress.com/2008/03/12/europe-can-no-longer-afford-to-take-africa-for-granted> (last visited Dec. 14, 2008).

145. See *supra* notes 109–13 and accompanying text.

146. See *supra* notes 99–103 and accompanying text.

147. See *supra* notes 109–13 and accompanying text.

workers.¹⁴⁸ The solution here would be to establish an immigrant visa system that sets criteria for admission based on determined family relationships and skills and then allows for the acceleration of the process to avoid the necessity of having the person in an undocumented status or waiting to be reunited with family or his employer for an extended period of time. For example, if the categories of the immediate family (spouse, parents, and children) of U.S. citizens and lawful permanent residents were to immigrate without quota restrictions there would not be extended delays. While the nuclear family relationships that form the basis for a sensible and humanitarian immigration policy are not difficult to agree on, the skills that are needed at any given time will likely shift in a rapidly changing global economy. These factors are compelling arguments for establishing a mechanism to periodically review the skills criteria needed for employment-based immigration. The immigration regime described here is weighted more heavily toward family-based immigration than towards employment and can be justified by the stability of an immigrant with an extended family network of siblings, parents and spouse. Moreover, an immigration system weighted in favor of family unification is more in keeping with the long standing policy of family unification found in most immigration laws. The periodic review of the occupations for which there are insufficient U.S. citizen workers could be done every three to five years in different economic or job markets in the country. Based on these surveys, the Secretary of Labor could certify these positions for permanent residency, without the need for quota restrictions.

VI. CONCLUSION

These proposals are both traditional and radical. They use existing law, through the immigration registry, to address the problem of dealing with a large underground undocumented population. The proposal is radical because it would replace the current fixed rigid quota system with an immigrant system based on family and employment categories, but without waiting lists. Many of those who make up the population of the undocumented are either sought after for work or have family ties with citizens and residents which, but for the quota restrictions, would allow them to

148. See *supra* notes 115–19 and accompanying text.

be legal participants. Having a large undocumented population is no longer an acceptable substitute for a realistic legal migration scheme. The proposal is premised on the fact that a free society can never completely seal its borders and remain free. It is further premised on the need for creating a system more suited to a globally competitive market and which is consistent with our values of family unification. I recognize that the challenges to crafting any reform seem most daunting, especially given the present economic climate. At some point in the very near term, however, the U.S. Congress and the next President will need to seek out and implement effective ways to deal with the current immigration problems.